

CLOSURE PROVISIONS IN MDL SETTLEMENTS

*D. Theodore Rave**

Closure has value in mass litigation. Defendants often insist on it as a condition of settlement, and plaintiffs who can deliver it may be able to command a premium. But in multidistrict litigation (MDL), which currently makes up over one-third of the federal docket, closure depends on individual claimants deciding to participate in a global settlement. Accordingly, MDL settlement designers often include terms designed to encourage claimants to opt in to the settlement and discourage them from continuing to litigate. Some of these terms have been criticized as unduly coercive and as benefiting the negotiating parties—the defendant and the lead lawyers for the plaintiffs—at claimants’ expense. But closure strategies vary widely and operate on claimants in complex ways. This Article examines closure provisions in recent publicly available MDL settlements. It creates a taxonomy of closure strategies, exploring how they work to ensure claimant participation and how they affect claimant choice and welfare. And it closes with a call for MDL judges to take a more active role in supervising and evaluating the terms of global settlements in MDLs.

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* Assistant Professor, University of Houston Law Center. Thanks for helpful comments are due to Lynn Baker, Andrew Bradt, Howard Erichson, Samuel Issacharoff, Judith Resnik, and the participants in this year’s colloquium entitled *Civil Litigation at a Time of Vanishing Trials* held at Fordham University School of Law. Research librarian Katy Badeaux provided invaluable assistance tracking down settlement agreements. For an overview of the colloquium, see Judith Resnik, *Lawyers’ Ethics Beyond the Vanishing Trial: Unrepresented Claimants, De Facto Aggregations, Arbitration Mandates, and Privatized Processes*, 85 FORDHAM L. REV. 1899 (2017).

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INTRODUCTION

Peace has value in mass litigation.¹ Indeed, securing sufficient closure is often critical to making settlement possible. And the procedural vehicle that has come to dominate the mass litigation landscape—multidistrict litigation, or MDL—provides a fertile environment for global settlement of the defendant's liability to potentially thousands of claimants.² In MDL, similar cases in federal courts all over the country are transferred to a single district judge for consolidated pretrial proceedings with the plan that they will eventually be sent back to their original courts for trial.³ But that almost never happens, as the goal (and typical endgame) of MDL is, and has always been, to achieve global resolution.⁴

In MDL, peace depends on individual claimants deciding to participate in a global settlement. Unlike the more familiar class action, where absent class members can be bound to a settlement if they do not opt out,⁵ an MDL consists of plaintiffs who have hired lawyers and filed their own lawsuits. And those suits generally cannot be settled en masse unless the claimants affirmatively opt into the deal.

So when crafting a global settlement, the negotiating parties—typically the defendant and the lawyers appointed by the MDL judge to the plaintiffs' steering committee (PSC)—have to find ways to ensure that enough

1. See, e.g., D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183 (2013).

2. See, e.g., Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2223 (2008).

3. 28 U.S.C. § 1407(a) (2012).

4. See Andrew D. Bradt, "A Radical Proposal": *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. (forthcoming 2017) (manuscript at 55), http://law.seattleu.edu/Documents/CivProWorkshop/Bradt_MD_L.pdf [<https://perma.cc/4ZBM-TPMP>].

5. See FED. R. CIV. P. 23(b)(3).

claimants participate in whatever alternative procedure they have set up to resolve claims.⁶ MDL settlements thus often include terms designed to encourage claimants to opt into the settlement and discourage them from continuing to litigate. These closure provisions range from walk-away participation thresholds below which the defendant can back out of the deal to bonus payments as the number of claimants participating approaches 100 percent to requirements that participating lawyers recommend settling to all of their clients and withdraw from representing those who refuse.

The risk that MDL settlements can include terms that benefit the negotiating parties more than claimants is well recognized.⁷ Indeed, a central feature of MDL is the complex principal-agent problem it presents. Although, as a formal matter, each claimant has hired a lawyer and filed an individual lawsuit, claimants who are sucked into an MDL have little actual control over the litigation; lawyers on the PSC make the important decisions.⁸ And in settlement negotiations, the PSC's interests may align more with the defendant's in getting a deal done than with the claimants' interests in maximizing individual recoveries. The PSC might thus be tempted to offer the defendant finality at claimants' expense. But the ever-present risk of agent disloyalty does not necessarily mean that global settlements emerging from MDLs are bad deals. Closure may be what the defendant demands in exchange for compensation, and claimants who can deliver it may be able to command a premium for doing so. The real trick is in telling the difference, and that is no easy feat.

A first step toward being able to evaluate the fairness of closure provisions in MDL settlements is to understand how they work. Because they tend to strongly encourage claimants to accept the deal and provide opportunities for defendants to back out if too few do, it can be tempting to think that closure provisions generally benefit defendants at claimants' expense.⁹ But closure strategies operate in different ways with different effects on claimants' choices and welfare. Some closure provisions can be quite coercive, leaving claimants vulnerable to sweetheart deals that foist inadequate settlements on them while handsomely rewarding the PSC with

6. Cf. D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT L. 91 (2014) (arguing that settlements in mass litigation are a form of alternative dispute resolution).

7. See, e.g., Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67 (2016); Elizabeth Chamblee Burch & Margaret S. Williams, *Repeat Players in Multidistrict Litigation: The Social Network*, 102 CORNELL L. REV. (forthcoming 2017) (manuscript at 5–6), <http://ssrn.com/abstract=2724637> [<https://perma.cc/XRK5-LWDB>]; Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979 (2010); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011).

8. See Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 FORDHAM L. REV. 1985, 1986 (2011).

9. See, e.g., Burch & Williams, *supra* note 7, at 5 (“All of the examined settlements featured at least one provision that encouraged closure and finality (which benefits the defendant), and nearly all settlements contained some provision that increased lead plaintiffs’ lawyers’ fees.”); see also Burch, *supra* note 7, at 143–44 (effectively equating automatic-enrollment provisions with higher walk-away thresholds and lawyer-recommendation provisions).

common benefit fees. But other closure provisions may be useful tools for claimants to credibly offer the defendant peace in exchange for a premium.

In this Article, I examine several closure strategies employed in publicly available MDL settlements.¹⁰ Settlements, by their very nature, are flexible and do not follow preset rules. Settlement designers seeking closure have, accordingly, tailored their strategies to the unique needs of different MDLs.¹¹ And they frequently include multiple terms that work together in complex ways to encourage claimant participation. In the taxonomy below, I attempt to group closure provisions into six categories reflecting different strategies for encouraging claimants to participate in global settlements instead of going it alone: terms that (1) define the defendant's exposure, (2) increase the value of participating in the settlement, (3) impair the litigation value of claims outside the settlement, (4) change the default rule to participation, (5) prevent lawyers from cherry-picking, and (6) alter the market for legal services.

These categories overlap in many ways. For example, terms that limit lawyer cherry-picking might also impair the litigation value of claims outside the settlement and alter the market for legal services. Some terms also work together as complements. A walk-away provision, for example, might create strategic dynamics that call for a lawyer-recommendation requirement, enforced by a lawyer-withdrawal provision, which, in turn, is made more effective by limits on lawyer advertising and referrals. But grouping these various (and often complementary) settlement terms into different categories can be useful for thinking about how they work to achieve closure and some of the problems that they raise.

I conclude with some thoughts on the role of the MDL judge when it comes to settlement. I have argued elsewhere that MDL judges should actively evaluate and express an opinion on global settlements in MDLs,

10. For identifying MDL settlements worthy of examination, I am indebted to Elizabeth Burch's and Margaret Williams's impressive studies of recent MDL settlements and the repeat-player lawyers who crafted them. See Burch, *supra* note 7; Burch & Williams, *supra* note 7. For a survey of terms that negotiating parties sometimes put in class action settlements to benefit themselves instead of class members, see Howard M. Erichson, *Aggregation as Disempowerment: Red Flags in Class Action Settlements*, 92 NOTRE DAME L. REV. 859 (2016).

11. Many of the MDL settlements I examine are nonclass aggregate settlements. This is no surprise given the U.S. Supreme Court's hostility toward resolving mass torts—which make up the bulk of MDL cases—through class action settlements. See, e.g., Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729 (2013); Samuel Issacharoff, Professor, N.Y.U. Sch. of Law, Snapshot of MDL Caseload Statistics, Presentation at Mass-Tort MDL Program at Duke University Law School 3 (Oct. 8, 2015), https://law.duke.edu/sites/default/files/centers/judicialstudies/snapshot_md_l_caseload_statistics.pptx (“[P]roducts liability makes up 92% of all pending MDL actions.”) [<https://perma.cc/8YEK-Y69R>]. But several high profile MDLs have recently been resolved in class action settlements, and closure matters in class settlements too. See, e.g., Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141. It is important not to draw too rigid a line between class and nonclass settlements in the MDL context. Claimants with positive-value claims who have filed their own lawsuits are likely to consciously decide to participate or not, whether the settlement is structured as a class action where they must opt out or a nonclass aggregate settlement where they must opt in.

even when structured as private, nonclass aggregate settlements.¹² The complexity of these settlements and the risk that dealmakers may try to use closure provisions to foist an unattractive deal on claimants only heightens the need for scrutiny by an MDL judge. It can be difficult for claimants to figure out on their own whether peace is worth the price. But for judges to effectively evaluate—and signal to claimants—whether an MDL settlement is fair, they need to understand how closure provisions work and be able to tell the difference between terms designed to prevent strategic holdouts and those designed to stifle genuine dissent. Thus, the following taxonomy attempts to break these provisions down and analyze how each of the various terms works to promote closure and affects claimant choice.

I. TERMS THAT DEFINE THE DEFENDANT’S EXPOSURE

For claimants to offer the defendant peace through settlement, the negotiating parties need to be able to define the extent of the defendant’s exposure. Walk-away provisions and case-census provisions fulfill this function.

A. Walk-Away Provisions

When a defendant offers to settle claims on a global basis, it opens itself up to the risk of adverse selection. Crafting a settlement that precisely values thousands of claims can be costly. Parties, therefore, typically group claims into rough categories. Claimants—and in particular claimants’ lawyers—tend to know more about the relative strength of their individual claims than the defendant.¹³ So if the defendant makes an open-ended offer to settle with all claimants who want to, the ones with the weakest claims within any given category will be the first on board. As a result, the defendant risks overpaying the weakest claims, only to be left facing the strongest claims in continued litigation.¹⁴ If the defendant is going to put real money on the table, it needs assurance that it is buying something approaching total peace, not just a collection of the weakest claims. Walk-away provisions, which are ubiquitous in MDL settlements (class and nonclass alike), give the defendant just that.

A walk-away provision allows the defendant to back out of the settlement if too few claimants sign on. There are many variations. The settlement can be a true all-or-nothing offer, which allows the defendant to back out if even a single claimant refuses to settle.¹⁵ More typically, the settlement will specify a lower participation threshold, say 95 percent of claimants,

12. Andrew D. Bradt & D. Theodore Rave, *The Information-Forcing Role of the Judge in Multidistrict Litigation*, 105 CALIF. L. REV. (forthcoming 2017) (manuscript at 1), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2828461 [https://perma.cc/JSJ9-GJAE].

13. See, e.g., Rave, *supra* note 1, at 1193–94.

14. See *id.*

15. E.g., Master Settlement Agreement §§ 6–7, *In re Fosamax Prods. Liab. Litig.*, No. 06-md-1789 (S.D.N.Y. Mar. 24, 2014) [hereinafter *Fosamax Settlement*] (requiring 100 percent participation).

below which the defendant can walk away.¹⁶ The walk-away threshold can also be tailored to ensure that a subset of claimants (e.g., those with a particular type of injury or even those represented by specific lawyers) is included.¹⁷ Indeed the threshold need not even be specified. In the NFL concussion settlement, for example, the defendant retained an absolute right to terminate the settlement for a fixed period of time after learning how many claimants opted out.¹⁸

The consequences of triggering the walk-away provision also vary. It could be a nuclear option: the defendant can blow up the whole deal if the threshold is not met.¹⁹ Or the walk-away provision could include a less drastic option, such as allowing the defendant to reduce the settlement amount proportionally if too few claimants participate.²⁰

Whatever its precise structure, a walk-away provision allows the defendant to change its mind about the settlement once it sees how the deal is shaping up. If too few claimants (or the wrong kinds) are opting in, the defendant need not overpay for weak claims; it can back out of the deal. This protection from adverse selection allows the defendant to put more

16. See, e.g., 2015 ASR Settlement Agreement § 17.1.1, *In re* DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig., No. 10-md-2197 (N.D. Ohio Mar. 2, 2015) [hereinafter DePuy II Settlement] (setting a 94 percent walk-away threshold); Settlement Agreement § 17.1.1, *In re* DePuy Orthopaedics, Inc. Hip Implant Prods. Liab. Litig., No. 10-md-2197 (N.D. Ohio Nov. 19, 2013) [hereinafter DePuy I Settlement] (94 percent); Settlement Agreement § 9.02, *In re* Yasmin and Yaz (Drospirenone) Mktg., Sales Practices & Prods. Liab. Litig., No. 3:09-md-2100 (S.D. Ill. Mar. 15, 2013) [hereinafter Yaz Gallbladder Settlement] (90 percent); Settlement Agreement § 11.1, *In re* Vioxx Prods. Liab. Litig., No. 05-md-1657 (E.D. La. Nov. 9, 2007) [hereinafter Vioxx Settlement] (85 percent).

17. See, e.g., ATE Master Settlement Agreement § 3.02, *In re* Yasmin and Yaz (Drospirenone) Mktg., Sales Practices Prod. Liab. Litig., No. 09-md-2100 (S.D. Ill. Aug. 3, 2015) [hereinafter Yaz ATE Settlement] (97.5 percent overall, 96 percent death and severe injury, 100 percent scheduled for trial); Master Settlement Agreement § 5.02, *In re* Actos (Pioglitazone) Prods. Liab. Litig., No. 11-md-2299 (W.D. La. Apr. 28, 2015) [hereinafter Actos Settlement] (95 percent overall, 95 percent death, 95 percent cystectomy, 95 percent under 60 years old, 95 percent used more than 12 months); Master Settlement Agreement § 10.02, *In re* NuvaRing Prods. Liab., No. 08-MD-1964 (E.D. Mo. Feb. 7, 2014) [hereinafter NuvaRing Settlement] (95 percent overall, 95 percent death, 95 percent ATE, 95 percent VTE, 95 percent recent injury, 95 percent timely filed); Vioxx Settlement, *supra* note 16, § 11.1.5 (all of the PSC's clients); Second MDL Program Term Sheet, § 1.B, *In re* Propulsid Prods. Liab. Litig., No. 00-md-1355 (E.D. La. Dec. 15, 2005) [hereinafter Propulsid II Settlement] (90 percent wrongful death, 95 percent other, 100 percent Achord); MDL-1355 Term Sheet § 1.B, *In re* Propulsid Prod. Liab. Litig., No. 00-md-1355 (E.D. La. Apr. 30, 2004) [hereinafter Propulsid I Settlement] (85 percent of wrongful death actions and 75 percent of the remaining claims).

18. Class Action Settlement Agreement (as Amended) § 16.1, *In re* NFL Players' Concussion Injury Litig., No. 12-md-2323 (E.D. Pa. Feb. 13, 2015) [hereinafter NFL Concussion Settlement].

19. See, e.g., Vioxx Settlement, *supra* note 16, § 11.1.5.

20. See, e.g., Fosamax Settlement, *supra* note 15, § 11.B; Master Settlement Agreement § IV.H, *In re* Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liab. Litig., No. 12-md-2325 (S.D. W. Va. June 14, 2013) [hereinafter AMS Settlement].

money on the table in the first place.²¹ In other words, the defendant may pay a peace premium, which benefits claimants as well as the defendant.²²

But a walk-away threshold also creates opportunities for individuals or groups of claimants to strategically hold out. Even where a settlement requires less than 100 percent participation, a small, coordinated group of claimants (perhaps sharing the same lawyer) can hold the deal hostage by threatening to trigger the walk-away provision unless paid off.²³

Walk-away provisions guarantee the defendant at least a certain degree of closure, but they are not, by themselves, bad for individual claimants.²⁴ Walk-away provisions may actually give individual claimants more leverage if they can threaten to hold up the settlement. But, these strategic dynamics create the need for some sort of cramdown mechanism to prevent holdouts from wrecking the deal.²⁵ In other words, by guaranteeing the defendant a second look, the walk-away provision pressures the lawyers who negotiate the settlement (and will only get paid if it's consummated) to find other tools—like the ones discussed below—to ensure that enough claimants participate.

One creative variation aimed at addressing these strategic concerns is the sealed walk-away threshold. In the BP oil spill settlement, for example, the PSC and defendant negotiated a walk-away threshold. But instead of specifying the required percentage in the settlement agreement, they filed it under seal with the MDL judge.²⁶ Keeping the precise threshold secret made it harder for any strategic player to coordinate a holdout bloc; he could not know for sure whether he had amassed enough willing opt-outs to credibly threaten the deal.²⁷ By frustrating strategic holdouts, a sealed walk-away threshold may give the defendant some protection from adverse selection without as much need for other cramdown mechanisms.

B. Case-Census Provisions

Case-census provisions also help define the defendant's exposure. In many MDL settlements, the defendant and PSC agree to jointly petition the MDL judge (often in cooperation with state judges managing parallel consolidations in state court) to order all lawyers with cases in the MDL to

21. Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 418–19 (2014).

22. See Rave, *supra* note 1, at 1193–97.

23. *Id.* at 1200.

24. *But cf.* Erichson, *supra* note 7, at 1008–13 (endorsing lower thresholds, but arguing that walk-away provisions approaching 100 percent place coercive pressure on claimants).

25. See, e.g., Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767–68 (1997).

26. Deepwater Horizon Economic and Property Damages Settlement Agreement as Amended on May 2, 2012, § 21.3.6, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex.*, on Apr. 20, 2010, No. 10-md-02179 (E.D. La. May 3, 2012) [hereinafter BP Settlement].

27. Issacharoff & Rave, *supra* note 21, at 419.

register with the settlement administrator all claims in which they have a financial interest—whether filed or unfiled.²⁸

Case-census provisions help define the universe of claims over which the parties are negotiating.²⁹ The information revealed can be used to set the denominator for a walk-away provision.³⁰ But the more important part of a case-census provision is its ability to expose the existence of *unfiled* claims. It flushes wait-and-see claimants out into the open, so lawyers cannot keep a stable of unfiled claims out of the settlement and later spring them on a defendant that thinks it has purchased peace. Requiring lawyers to register every claim in which they have a financial interest—not just the ones where they are counsel of record—also reveals information about referral networks on the plaintiffs’ side so the parties can identify the major aggregators.

In conjunction with case-census provisions, MDL settlements often limit eligibility for payments to claimants who had retained a lawyer as of the settlement’s execution date.³¹ In effect, these terms use retaining a lawyer—instead of filing a lawsuit—as a proxy for how serious a threat the claimant poses. Doing so captures the wait-and-see plaintiffs that the defendant wants in the settlement while avoiding the “Field of Dreams” problem: if you build a mass settlement, claimants who never would have sued will come out of the woodwork to settle.³²

Although some have characterized case-census provisions as terms that benefit defendants by providing closure,³³ they are not inherently coercive and do little to limit claimant choice. They only require claimants who have remained anonymous to identify themselves. That information facilitates the transaction. Designing a comprehensive settlement is easier when the universe of claims—and thus the scope of the defendant’s exposure—is known than when the parties must account for potential claimants who may come out of the woodwork once the settlement is announced or stay in the woodwork and bring future claims outside the settlement.

28. See, e.g., Yaz ATE Settlement, *supra* note 17, § 1.02; Actos Settlement, *supra* note 17, § 1.02; DePuy II Settlement, *supra* note 16, § 3.2.1; NuvaRing Settlement, *supra* note 17, § 1.5; DePuy I Settlement, *supra* note 16, § 3.2.1; Vioxx Settlement, *supra* note 16, § 1.1.

29. Actos Settlement, *supra* note 17, § 1.01 (“The purposes of the registration requirements . . . are to allow the Parties and the Courts to identify the filed and unfiled cases and claims connected to ACTOS Products, to create a joint database of such cases and claims which will help the MDL Court and the Illinois and California Coordinated Courts cooperatively manage this litigation, and to assist the Parties with effectuating the provisions of this Agreement.”).

30. See Burch, *supra* note 7, at 90–91.

31. See, e.g., Yaz ATE Settlement, *supra* note 17, § 2.02; NuvaRing Settlement, *supra* note 17, § 1.04; Yaz Gallbladder Settlement, *supra* note 16, § 1.05; see also Actos Settlement, *supra* note 17, § 2.04(A) (three-day grace period).

32. RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 147 (2007).

33. Burch, *supra* note 7, at 90–91; Burch & Williams, *supra* note 7, at 48.

II. TERMS THAT INCREASE THE VALUE OF PARTICIPATING IN THE SETTLEMENT

A mass settlement will deliver more closure if it makes participating more attractive to claimants than continuing to litigate. One way to do that is to increase the value of participation.

A. *More Money*

The simplest way to get more claimants to settle is for the defendant to offer more money. Claimants, unsurprisingly, like this particular closure strategy. Defendants, by contrast, would rather keep the money and may worry about increasing incentives for strategic action.

Defendants might be perfectly happy to pay real money to settle strong claims. Defendants have reputations to maintain and may see value in putting a stop to the negative publicity, drag on stock prices, and unwanted regulatory scrutiny that often accompanies mass litigation.³⁴ But they do not want to pay real money to strategic players who funnel weak claims into the settlement or threaten to hold up a deal. Given their informational disadvantage relative to claimants and their lawyers, defendants may have a hard time differentiating between genuine and strategic players. And the more money the defendant makes available in the settlement, the more the other side stands to gain from strategic action. As a result, simply sweetening the pot may not always buy defendants the peace they desire. And, of course, defendants may prefer other, more coercive closure provisions when those bring peace at a lower cost.

Recent examples of defendants seeking to purchase closure through generous payments include the BP oil spill and Volkswagen diesel emissions settlements. To take just one aspect of the BP settlement, the seafood compensation program paid claimants several times as much as the voluntary compensation program that BP set up after the spill, totaling almost five times the annual revenue of the entire Gulf seafood industry.³⁵ In the Volkswagen settlements, the company agreed to buy back cars at their pre-emissions-scandal value on top of substantial restitution payments.³⁶ Of course, an outsider cannot know how much the desire for closure factored into these settlements or gauge the effects of seemingly generous payments against the counterfactual where the defendant offered less. While more money can buy more closure, it is difficult to measure when or how much.

B. *Participation Bonuses*

Participation bonuses are a more tailored way to increase the value of participating in the settlement. They work by increasing the total settlement

34. See Rave, *supra* note 1, at 1195.

35. See Issacharoff & Rave, *supra* note 21, at 405–06, 410–11.

36. Consumer Class Action Settlement Agreement and Release (Amended), § 4, *In re* Volkswagen “Clean Diesel” Mktg., Sales Practices and Prods. Liab. Litig., No. 15-md-2672 (N.D. Cal. July 26, 2016) [hereinafter Volkswagen Settlement].

fund in escalating amounts as participation approaches 100 percent. In the Propulsid settlement, for example, the defendant agreed to pay a base amount of \$69.5 million as long as 85 percent of wrongful-death claimants opted in, but the defendant would add on escalating payments for each additional percentage point of participation: \$700,000 for each point between 86 percent and 90 percent, \$900,000 for each point between 91 percent and 95 percent, and \$1.7 million for each point between 96 percent and 100 percent.³⁷ The World Trade Center disaster site settlement had a similar structure: the defendants would pay \$625 million if 95 percent of claimants opted in, escalating up to \$712.5 million if 100 percent opted in.³⁸ In other words, to get the last 5 percent to sign on, the defendant was willing to pay more than twice as much per claimant as for the first 95 percent.³⁹

Participation bonuses like these reflect the defendant's willingness to pay a premium for peace, and they benefit claimants who can deliver it.⁴⁰ Although the defendant is paying more money for the last claim than for earlier claims, the extra money does not go to the last claimant. Instead, it goes into the total fund to be allocated according to whatever formula is in the settlement agreement. This works out well for claimants, as they can capture the peace premium if enough of them opt in, but they still get paid something if they cannot deliver total peace; the deal does not evaporate because a handful reject it. In this sense, participation bonuses are the flipside of terms that allow the defendant to reduce the settlement amount if the walk-away threshold is not met instead of blowing up the whole deal.⁴¹ Participation bonuses, however, give claimants more advance certainty because they do not give the defendant the option to go nuclear instead of simply withholding a premium.

Because the whole deal's viability is not at stake, participation bonuses present less incentive and opportunity for strategic players to hold out. But because money will be left on the table if some claimants refuse to participate, lawyers may still be tempted to pressure clients to opt in.

37. Propulsid I Settlement, *supra* note 17, § 3.B. The second Propulsid settlement had a similar structure. Neither settlement's participation-bonus feature actually resulted in additional compensation for claimants because too few qualified for payments, and the unexhausted fund reverted to the defendant. *See* Burch, *supra* note 7, at 89–90. But the Propulsid structure still illustrates how participation bonuses can function.

38. World Trade Center Litigation Settlement Process Agreement, as Amended, §§ II.A, IV, VI.E (Mar. 11, 2010), <http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540> [<https://perma.cc/7AUV-CZ39>]. The World Trade Center Disaster Site Litigation was not technically an MDL, but it was a similarly structured mass consolidation of all cases arising out of the 9/11 terrorists attacks.

39. Rave, *supra* note 1, at 1184–85.

40. The Actos settlement also included participation bonuses, but they were not escalating like Propulsid or WTC, so they less clearly reflect a peace premium. Actos Settlement, *supra* note 17, § 10.01(A).

41. *See supra* note 20 and accompanying text.

III. TERMS THAT IMPAIR THE LITIGATION VALUE OF CLAIMS OUTSIDE THE SETTLEMENT

Boosting the benefits of participation is not the only way to make settlement look more attractive than litigation. The dealmakers may also include terms that make continued litigation harder. These terms do more than take away benefits of aggregation (e.g., scale economies, shared resources, and risk pooling) and actually impair the litigation value of claims outside of the settlement.

A. Lone Pine Orders

Lone Pine orders are not actually settlement terms, though the settling parties may agree to jointly petition the MDL judge for one after the settlement is consummated. *Lone Pine* orders are case-management orders that require nonsettling plaintiffs in the MDL to come forward with certain evidence (typically medical or expert evidence of injury or causation) by a certain deadline or face summary judgment.⁴² In other words, nonsettling plaintiffs have to “put up or shut up.”

Although they are sometimes described as a “post-settlement mop-up procedure,”⁴³ *Lone Pine* orders do not require anything of claimants that they would not ultimately have to produce at trial. So they do not, in that sense, significantly impair the litigation value of nonsettling claims. They do, however, accelerate the time frame and force claimants’ lawyers to invest in these cases right away or abandon them. In that sense, participating in a global settlement may look relatively more attractive.

B. Most-Favored-Nation Clauses

Most-favored-nation clauses are agreements that, if the defendant subsequently settles on more favorable terms with any claimant outside the global settlement, it will retroactively increase payments to participating claimants to match. While it might look like these terms increase the value of participating and thus belong in the previous category, that is not their primary function. A most-favored-nation clause is designed to never be triggered. Instead it signals to claimants that they will not get a better deal outside of the global settlement, because it would cost the defendant too much to top up all of the participating claimants.⁴⁴ The defendant is essentially precommitting to fight nonparticipating claimants tooth and nail.

42. *Lone Pine Order*, BLACK’S LAW DICTIONARY (10th ed. 2014); see, e.g., *Lore v. Lone Pine Corp.*, No. L-33606-85, 1986 WL 637507 (N.J. Super. Ct. Law Div. Nov. 18, 1986); Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 155 (2012).

43. Burch, *supra* note 7, at 100 (quoting PSC’s Memorandum of Points and Authorities in Opposition to Defendant Merck’s Motion for Entry of *Lone Pine* Order at 7, *In re Fosamax Prods. Liab. Litig.*, No. 06-md-1789 (S.D.N.Y. Oct. 29, 2012)).

44. Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 218 (2003).

Most-favored-nation clauses have been used in several class action settlements within MDLs.⁴⁵ But they may be less practical in nonclass aggregate settlements (particularly mass torts), where the details and strength of claims may vary significantly. Because a most-favored-nation clause is triggered when the defendant settles on more favorable terms with a nonparticipating claimant, there must be some way to determine whether the terms were or were not more favorable. And that can be difficult if the claimants are differently situated (i.e., the nonparticipating claimant might get more money for more severe injuries). Further, this is something that the parties would be likely to fight about postsettlement, undermining the point of a closure provision to begin with. So some mass tort settlements, like those offering relatively uniform compensation on a defined grid, may be amenable to most-favored-nation clauses, while others, like those that enlist a settlement administrator to determine individualized payments, may not.

When they are used, most-favored-nation clauses provide a powerful incentive for claimants to participate in the global settlement, unless they are willing to take their cases to trial.

C. Trust Secured by All of the Defendant's Assets

An even stronger way to impair the litigation value of claims outside the settlement is to use the settlement to effectively make them junior creditors to participating claimants. The parties in the Sulzer hip case attempted to employ this strategy by creating a trust to pay claims in a comprehensive settlement program.⁴⁶ The trust was funded with the defendant's insurance proceeds, cash, and much of its future income stream, and it was secured by a lien on all of Sulzer's assets—although those assets could be sold free and clear of the lien for business purposes, so long as the proceeds did not go to pay nonparticipating claimants.⁴⁷ This trust-and-lien structure severely impaired the litigation value of claims outside the settlement. Even if a nonparticipating claimant won his trial and appeal, he could not collect on any of Sulzer's assets until all participating claimants had been paid through the settlement program—a process expected to take six years, with no guarantee that anything would be left over.⁴⁸

The Sulzer hip settlement was done as a class action, but there is no reason that MDL dealmakers could not adopt a similar trust-and-lien structure for a nonclass aggregate settlement that would take effect once some threshold number of claimants opted in. If they did, there would be no judicial fairness review under Rule 23(e) to derail the deal, as the courts

45. See, e.g., *In re Vitamins Antitrust Class Actions*, 215 F.3d 26 (D.C. Cir. 2000); *Brown v. Esmor Corr. Servs., Inc.*, No. Civ. 98-1282DRD, 2005 WL 1917869, at *10 (D.N.J. Aug. 10, 2005); see also 4 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 13:5 (5th ed. 2014).

46. Nagareda, *supra* note 44, at 209–11.

47. *Id.*

48. *Id.* at 209–10 (quoting Sulzer's lawyer, Richard Scruggs).

effectively did in the Sulzer case.⁴⁹ Though perhaps there are limits to how far the defendant and PSC can go in using this sort of trust-and-lien structure in a nonclass settlement to foist an unattractive deal on claimants. A nonclass aggregate settlement would require initial buy-in from enough claimants (many of whom will have separate representation in the MDL) to make it look like the deal will succeed before it would pose a credible threat to claimants who would rather not participate. In a class action, by contrast, all of the claimants are presumptively in the settlement, unless they have the guts to opt out in the hopes that enough other claimants will follow them to destroy the deal. But even in a nonclass aggregate settlement, the trust-and-lien structure could be a powerful tool to cramdown a settlement with buy-in from the majority over the objection of a minority of claimants who believe they are being underpaid.

IV. TERMS THAT CHANGE THE DEFAULT RULE TO PARTICIPATION

Another way to increase closure in an MDL settlement is to shift the default rule from nonparticipation to participation. This is most easily and legitimately achieved through a class action settlement, but parties in MDLs have experimented with shifting the default rule contractually as well.

A. Class Action Settlement

The ultimate closure mechanism would be to structure the settlement as a mandatory class action under Federal Rule of Civil Procedure 23(b)(1) or (b)(2). But in *Ortiz v. Fibreboard Corp.*⁵⁰ and *Wal-Mart Stores, Inc. v. Dukes*,⁵¹ the U.S. Supreme Court has limited mandatory class actions to a narrow set of circumstances.

Rule 23(b)(3) opt-out class actions are also limited to situations where the claims are similar enough to form a cohesive class and thus unavailable in many MDLs.⁵² But class action settlements in MDLs are by no means rare. To name just a few high-profile examples, the MDLs in the BP oil spill, NFL concussion, and Volkswagen diesel emissions litigations were all resolved through class-action settlements.⁵³

A class action settlement increases closure by shifting from an opt-in model to an opt-out model. Instead of individual claimants needing to affirmatively sign on to the settlement, all claimants within the class

49. The parties renegotiated the settlement to eliminate the trust-and-lien structure and pay claimants more after the Sixth Circuit expressed “serious doubts” about the district court’s approval of the settlement under Federal Rule of Civil Procedure 23(e). *See In re Inter-op Hip Prosthesis Prods. Liab. Litig.*, No. 01-4039, 2001 WL 1774017 (6th Cir. Oct. 29, 2001), *vacated in part*, No. 01-4039, 2001 WL 34110370 (6th Cir. 2001); Nagareda, *supra* note 44, at 215–16.

50. 527 U.S. 815 (1999).

51. 564 U.S. 338 (2011).

52. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).

53. Volkswagen Settlement, *supra* note 36; NFL Concussion Settlement, *supra* note 18; BP Settlement, *supra* note 26.

definition are automatically bound by the settlement unless they opt out. Default rules are “sticky,” the theory goes, so changing the default from nonparticipation to participation will inevitably sweep in more claimants.⁵⁴

The default rule matters tremendously in small-claims class actions, where most class member pay little attention to their claims. But it matters less to claimants who have gone through the trouble of hiring a lawyer and filing a lawsuit that was consolidated in the MDL. Particularly in mass tort MDLs, where claims are often substantial, plaintiffs with cases pending are going to make a conscious decision to participate or not in the settlement, no matter what the default rule is.

Where a class action settlement can offer additional closure is in its ability to reach potential claimants who have not yet filed suit. If these claimants can be properly included in the class definition, the class action settlement can force them to decide by a certain date to either opt out of the settlement or forever forego their right to sue.⁵⁵ Of course, a class action settlement requires court approval, and the cases where dealmakers find it most advantageous to secure closure—to bind exposure-only claimants—are the very scenarios where courts are most skeptical about its use.⁵⁶

B. Automatic-Enrollment Provisions

Some enterprising dealmakers have attempted to recreate features of the class action’s opt-out default rule in nonclass MDL settlements. In the Yaz gallbladder settlement, for example, the negotiating parties agreed that the MDL judge would enter case-management orders in all gallbladder-injury cases pending in the federal MDL that would automatically enroll plaintiffs in the settlement unless they affirmatively opted out by a certain date.⁵⁷ If these plaintiffs did not opt out and did not submit claim packages in the settlement program, their cases would be dismissed with prejudice.⁵⁸ The MDL judge entered the requested orders.⁵⁹

The scope of the Yaz settlement’s shift to an opt-out model was, however, significantly more limited than a Rule 23(b)(3) class action settlement. The automatic-enrollment provision did not apply to claimants with cases pending in state court, those with unfiled claims, or even all claims pending in the federal MDL.⁶⁰ It expressly excluded claimants

54. See Issacharoff & Rave, *supra* note 21, at 425. See generally CASS R. SUNSTEIN & RICHARD H. THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008); Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism,”* 151 U. PA. L. REV. 1211 (2003).

55. See Issacharoff & Rave, *supra* note 21, at 421–22.

56. See, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods.*, 521 U.S. at 623; *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001). But see *In re NFL Players’ Concussion Injury Litig.*, 307 F.R.D. 351 (E.D. Pa. 2015).

57. *Yaz Gallbladder Settlement*, *supra* note 16, §§ 1.01(A), 6.01(A).

58. *Id.* § 6.01(A).

59. Order No. 60: Case Management (Settlement Agreement and Deadlines—Gallbladder Injuries) at 2–4, *In re Yasmin and Yaz (Drospirenone) Mktg., Sales Practice. & Prod. Liab. Litig.*, No. 3:09-md-2100 (S.D. Ill. Mar. 19, 2013) [hereinafter *Yaz Case Management Order*].

60. *Id.* at 4.

alleging more serious injuries alongside their gallbladder claims.⁶¹ All of those claimants were eligible to participate in the settlement, but they would have to affirmatively opt in.

This sort of automatic-enrollment provision required the cooperation of the MDL judge, and it is not clear that judges have this power. The court went along with the plan in Yaz, where the claims for gallbladder injury were modest and fairly uniform.⁶² And there is a plausible argument that shifting the default rule on such claims might be justified as an attempt to reduce transaction costs for modest claims pending in the federal MDL. The automatic-enrollment program excluded higher-value claims and provided a robust form of notice—entry on the individual dockets for represented parties with currently pending federal cases.⁶³ But it is unquestionably an aggressive use of the MDL judge’s case-management power to change the default rule without Rule 23’s formal protections.

Claimants’ lawyers might also try to shift the default rule without any judicial participation. In the Propulsid settlement, for example, the (presumably negotiated) form letter that the PSC designed for participating lawyers to send their clients said that the lawyers would be opting all of their clients into the settlement unless they returned an enclosed opt-out form.⁶⁴ The Propulsid settlement included more substantial and less uniform claims than the Yaz gallbladder settlement, but the letter acknowledged that most claimants would receive no compensation under the settlement.⁶⁵ Such unilateral action by the lawyers would seem to run afoul of the legal ethical rules governing settlement.⁶⁶

V. TERMS THAT PREVENT LAWYERS FROM CHERRY-PICKING

Because a class action gives a single lawyer monopoly control over the class members’ claims, the defendant need only negotiate with one counterparty to craft a comprehensive settlement.⁶⁷ Without that monopoly, MDL defendants must deal with hordes of claimants either individually or through their bargaining agents. Defendants can—and do—deal with the court-appointed PSC as a counterparty in settlement

61. *Id.*

62. Yaz Gall Bladder Settlement, *supra* note 16, § 2.05.

63. Yaz Case Management Order, *supra* note 59.

64. Form Letter Claims on Behalf of Decedents at 3, *In re Propulsid Prods. Liab. Litig.*, No. 00-md-1355 (E.D. La. Apr. 30, 2004) [hereinafter Propulsid Form Letter], <http://www.laed.uscourts.gov/case-information/mdl-mass-class-action/propulsid> (“WE WILL BE OPTING YOUR CLAIM INTO THE SETTLEMENT PROGRAM UNLESS YOU RETURN TO US, VIA CERTIFIED MAIL, RETURN RECEIPT, AN OPT OUT FORM. THE OPT OUT FORM IS ENCLOSED. IT SHOULD ONLY BE RETURNED TO US IN THE EVENT YOU DO NOT DESIRE TO PARTICIPATE IN THE SETTLEMENT PROGRAM. YOU MUST RETURN THE OPT OUT FORM BY AUGUST 15, 2004 OR ELSE YOUR CLAIM WILL BE INCLUDED IN THE SETTLEMENT PROGRAM.”) [<https://perma.cc/NVP4-ZHVY>].

65. *Id.*

66. See MODEL RULES OF PROF’L CONDUCT r. 1.2(a) (AM. BAR ASS’N 2016) (“A lawyer shall abide by a client’s decision whether to settle a matter.”); *id.* r. 1.4 (communications).

67. See Nagareda, *supra* note 44, at 164.

negotiations.⁶⁸ But the PSC does not control all of the claims like a class action lawyer. While the PSC can negotiate the structure of a global settlement, they still need buy-in from the claimants and their individual lawyers.

The network of client solicitation and referral arrangements that exists on the plaintiffs' side in mass litigation tends to consolidate groups of claimants in the hands of major aggregators.⁶⁹ Given the inevitability of this sort of informal aggregation, MDL dealmakers in the early 2000s hit on an innovation where defendants do deals with the *lawyers* instead of with the claimants directly.⁷⁰ These deals make each lawyer's inventory the unit of negotiation and typically take the form of a global offer to all of the lawyers in the MDL to settle their case inventories.

But dealing with lawyers, inventory by inventory instead of claim by claim, creates opportunities for cherry-picking. Knowing more than the defendant about the strength of claims in their inventories, the lawyers will predictably funnel the weakest claims into the settlement and use the threat of taking the strongest claims to trial to hold out for more—exactly the type of adverse selection that the defendant wants (and may be willing to pay) to avoid. This is, after all, why defendants insist on terms like walk-away provisions. So the defendant and PSC try to design these deals so that a lawyer who wants to settle any claims in the global settlement must agree to settle all of the claims in his or her inventory.⁷¹ There are several strategies by which dealmakers try to limit lawyer cherry-picking.

A. Voting

One way for a lawyer to precommit not to engage in cherry-picking is to have his clients agree in advance to be bound by a vote among themselves on whether to accept a group settlement offer.⁷² Claimants might find this arrangement advantageous because it allows their lawyer to offer to settle their claims as a single package in exchange for a peace premium.⁷³

Binding claimants to a vote disables would-be holdouts, thereby maximizing the group's collective negotiating position. And, although individual claimants can be bound over their objection, the voting mechanism does not shift leverage toward the defendant the way that terms

68. In this sense, the PSC shares some of the state-conferred monopolistic features of class counsel. See Samuel Issacharoff, *The Governance Problem in Aggregate Litigation*, 81 *FORDHAM L. REV.* 3165, 3168 (2013).

69. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 *DUKE L.J.* 381, 387 (2000); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 *BROOK. L. REV.* 961, 963 (1993); Judith Resnik, *From "Cases" to "Litigation,"* 54 *LAW & CONTEMP. PROBS.* 5, 28–35 (1991). Informal aggregation has been going on for a long time. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 *VAND. L. REV.* 1571, 1596 (2004).

70. See Burch, *supra* note 7, at 90–91.

71. See *id.* at 127.

72. See, e.g., *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 515 (N.J. 2006).

73. See, e.g., Rave, *supra* note 1, at 1187; Silver & Baker, *supra* note 25, at 751.

impairing the litigation value of claims outside the settlement do.⁷⁴ Because claimants can still participate in the settlement if they are outvoted, those opposed to the deal can safely vote against it; they need not take the much bigger risk of opting out and litigating alone.⁷⁵ This makes it difficult for the defendant to lowball the group. But, like any majoritarian process, it creates the risk that claimants in the minority (especially those with atypically strong claims) can be exploited, so a fair allocation process is critical to making voting work.⁷⁶

Although the ALI's Principles of the Law of Aggregate Litigation endorsed a voting mechanism along these lines, no state has yet modified its ethics rules to permit it.⁷⁷ The voting arrangement is inconsistent with prevailing interpretations of the aggregate settlement rule, and there are concerns about how genuine clients' advance consent can be.⁷⁸ The debate is well ventilated.⁷⁹ I will not rehash it here, except to say that voting can prevent lawyer cherry-picking without many of the undesirable features of other closure provisions that dealmakers use in MDL settlements.

B. Lawyer-Recommendation Provisions

Another way that dealmakers try to limit cherry-picking is by requiring lawyers who enroll claimants to agree to recommend the settlement to all clients in their inventories (typically both those who have filed lawsuits and those who have signed retainer agreements but not yet filed). In other words, the lawyer cannot funnel only weak claims into the settlement, because, in order for any client to participate, the lawyer must become a party to the settlement and agree to recommend it to all clients.

Lawyer-recommendation provisions take many forms. The Propulsid settlement, the original Vioxx settlement, and the AMS mesh products

74. Rave, *supra* note 1, at 1248–49.

75. *Id.*

76. *Id.* at 1249–50.

77. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (AM. LAW INST. 2010); see Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 515 (2012) (noting that no state has adopted the ALI voting mechanism).

78. See Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 521, 523 (N.J. 2006); Erichson & Zipursky, *supra* note 7, at 298–311; Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 180–81 (1999).

79. Compare Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 570–71, Erichson & Zipursky, *supra* note 7, Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—And More*, 79 GEO. WASH. L. REV. 717, 718 (2011), Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decisionmaking?*, 57 DEPAUL L. REV. 395, 401 (2008), Moore, *supra* note 78, and Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 734 (2011), with Rave, *supra* note 1, Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 757 (2011), Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1469 (1998), and Silver & Baker, *supra* note 25.

settlement included strong forms of lawyer-recommendation provisions, which simply required any participating lawyer to recommend the settlements to all of his or her clients.⁸⁰ The lawyer must be either all in as to his or her inventory or all out. This strong provision can put a lawyer who believes the settlement is a good deal for some clients, but a bad deal for others, in an ethical pickle.⁸¹ The lawyer cannot loyally serve both sets of clients simultaneously by being all in or all out.

Accordingly, many lawyer-recommendation provisions include an ethical out—conditioning the recommendation on the lawyer’s independent professional judgment. The details matter for these ethical outs. Some, like the amended Vioxx settlement, appear to be little more than window dressing. Participating lawyers had to agree that they had exercised their “independent judgment in the best interests of each client individually” and, having done so, that they would recommend participation to 100 percent of their clients.⁸² This does not present a problem where the lawyer truly believes that the settlement is in the best interest of each and every client. But if the lawyer believes that some, but not all, clients would do better litigating alone, the lawyer is placed in an untenable situation.⁸³ He can either not participate and violate the duty to bring all settlement offers to clients or participate and give bad advice to some clients.

Other MDL settlements appear to offer lawyers a real ethical out. The DePuy ASR settlement, for example, stressed that the ultimate decision whether to enroll “rests with each individual” claimant.⁸⁴ Participating lawyers had to agree that “subject to the exercise of their independent professional judgment as to the circumstances of individual clients, they will endorse enrollment in [the settlement] to clients covered by this Agreement” and that they would use their “best efforts” to obtain all of the required documentation “from all of their clients who elect to enroll.”⁸⁵ And the Yaz ATE settlement required lawyers to agree that “counsel for each Claimant shall individually evaluate their client’s participation in this Program, and shall recommend participation in the Program to all clients for whom they believe participation is appropriate.”⁸⁶

Although scholars sometimes lump all of these lawyer-recommendation provisions together as terms that reduce client choice,⁸⁷ they differ significantly. A lawyer participating in the DePuy settlement would not

80. AMS Settlement, *supra* note 20, § IV.B; Vioxx Settlement, *supra* note 16, § 1.2.8.1; Propulsid II Settlement, *supra* note 17, § 3.D; Propulsid I Settlement, *supra* note 17, § 3.D.

81. See Erichson & Zipursky, *supra* note 7, at 283–84.

82. Amendment to Settlement Agreement § 1.2.2, *In re Vioxx Prods. Liab. Litig.*, No. 05-md-1657 (E.D. La. Jan. 17, 2008).

83. See Conn. Bar Ass’n, Informal Op. 08-01 (2008) (explaining the obligations of plaintiffs’ counsel under a particular aggregate settlement agreement); Erichson, *supra* note 7, at 1004. *But see* Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1952–57 (2017) (arguing that a lawyer could not participate as to any clients).

84. DePuy I Settlement, *supra* note 16, § 17.2.5.

85. *Id.* § 17.2.8.

86. Yaz ATE Settlement, *supra* note 17, § 1.02(D).

87. Burch, *supra* note 7, at 90–91; Burch & Williams, *supra* note 7, at 59–60.

face the same ethical conundrum as in the Vioxx settlement if he thought the settlement was a good deal for some but not all of his clients. And the Yaz ATE settlement seems to require lawyers to do exactly what ethical lawyers should do.

Finally, some MDL settlements include terms requiring lawyers on the PSC to use their “best efforts” to achieve sufficient participation.⁸⁸ Although these best-efforts provisions are sometimes lumped in with other lawyer-recommendation provisions,⁸⁹ they do not operate the same way, and they do little to prevent lawyer cherry-picking because they apply only to the PSC, not to the lawyers who are signing up inventories in the settlement the PSC negotiated. Those lawyers remain free to recommend the settlement to some clients but not others.

While some lawyer-recommendation provisions may be unobjectionable, the stronger forms can encourage lawyers to treat their clients as groups, not as individuals.⁹⁰ And if the settlement is a good deal for the group as a whole, the lawyer may be tempted to give bad advice to individual clients who might do better outside of the settlement if it means that the group can participate (and the lawyer can get paid).

But even the strongest forms of lawyer-recommendation provisions are rather weak closure devices standing alone. It is unclear how they could be enforced without intrusive discovery into the lawyer-client relationship. Ethical outs give lawyers plenty of wiggle room to steer clients with strong claims out of the settlement. And dissatisfied clients can ignore the lawyer’s (perhaps half-hearted) recommendation, while the lawyer says, “Well, I tried.” For these reasons, lawyer-recommendation provisions are often combined with other terms, such as inventory-expulsion or lawyer-withdrawal provisions, to give them teeth.

C. Inventory-Expulsion Provisions

Inventory-expulsion provisions put some teeth in lawyer-recommendation provisions and help to enforce the in-for-a-penny-in-for-a-pound nature of the deal between the defendant and the lawyers. Like other closure provisions, their forms can vary.

Some impose a flat ban: participating lawyers “shall not be permitted to enroll less than 100% of the MDL plaintiffs they represent.”⁹¹ These inventory-expulsion provisions work by tying lawyers’ financial incentives to their ability to deliver their entire inventories. If even one client does not want to participate, the lawyer risks having his entire inventory shut out of the deal, meaning that he cannot get paid for enrolling any claimants in the settlement. This creates a temptation for the lawyer to pressure the

88. Yaz ATE Settlement, *supra* note 17, § 3.01; Actos Settlement, *supra* note 17, § 5.01; NuvaRing Settlement, *supra* note 17, § 10.01; Yaz Gallbladder Settlement, *supra* note 16, § 9.01.

89. Burch, *supra* note 7, at 91; Burch & Williams, *supra* note 7, at 59–60.

90. *See, e.g.*, Burch, *supra* note 7, at 104.

91. Propulsid II Settlement, *supra* note 17, § 3.D; Propulsid I Settlement, *supra* note 17, § 3.D.

reluctant client into participating so that the lawyer (and other clients) can get paid.

Other inventory-expulsion provisions are more nuanced. The Vioxx settlement gave the defendant an option to expel all or part of a lawyer's inventory if the lawyer failed to recommend participation to all of his clients or attempt to withdraw from representing nonsettling claimants.⁹² Thus the lawyer's fate was not tied to a single recalcitrant client, as long as the lawyer took all necessary steps to try to withdraw from representing that client.

Further, the DePuy settlement allowed the defendant to expel a participating lawyer's inventory if, and only if, the special master appointed to oversee the settlement found that that lawyer "did not act in good faith" in connection with the lawyer-recommendation provision, which included a real ethical out.⁹³ So the defendant could not kick a lawyer's inventory out of the deal unilaterally but only upon a neutral party's finding that the lawyer acted in bad faith.⁹⁴

How coercive this is depends on what counts as "good faith," and the key provision in the DePuy settlement is that the special master, not the defendant, will make that determination.⁹⁵ Would a lawyer be acting in good faith if he told a client with a good shot of winning at trial to reject the settlement because he would get more by litigating alone? Or by advising a client who had nonmonetary reasons for litigating not to settle? The DePuy settlement's lawyer-recommendation provision included an ethical out, so quite probably yes, that would be a good faith reason to recommend that some clients not participate. But a lawyer would probably not act in good faith by telling clients with weaker claims to take the settlement and then using the remaining stronger claims to threaten to trigger the walk-away threshold unless he got a side payment. Such strategic behavior could hardly be described as good faith. What about a lawyer who thought that the settlement offer probably exceeded the expected value of his client's claim but thought he could negotiate a larger payment outside of the global settlement because of the defendant's desire to end negative publicity? Is that good faith? Perhaps a zealous advocate should make such a move on his client's behalf. But the extra payment that the claimant may be able to extract is not tied to the individual merit of the claim. Reasonable minds could differ.

The good faith inventory-expulsion provision in DePuy creates uncertainty for the lawyer. Advising clients not to opt in to the settlement puts the lawyer's entire inventory at risk depending on the special master's

92. Vioxx Settlement, *supra* note 16, § 1.2.6.2.

93. DePuy I Settlement, *supra* note 16, § 17.2.12; *see also id.* §§ 17.2.8, 17.2.9–11.

94. Contrary to some suggestions, the DePuy good faith provision does not operate like a lawyer-withdrawal provision. *Cf.* Burch, *supra* note 7, at 103–04. An inventory-expulsion provision pressures lawyers into enrolling their entire inventories and works only indirectly on claimants, if the lawyers in turn pressure their clients to settle. A lawyer-withdrawal provision puts direct pressure on claimants, telling them that if they do not participate, they will have to find another lawyer.

95. *See supra* note 93.

view of good faith. Therefore, a lawyer might think twice about advising a client not to settle. Depending on the special master's interpretation, however, a good faith provision may actually be well tailored to limit strategic holdouts and still allow claimants who have atypically strong claims or genuine problems with the deal to continue to litigate with the same lawyer.

D. Lawyer-Withdrawal Provisions

Another way to put teeth into a lawyer-recommendation provision is to pair it with a lawyer-withdrawal provision. These terms require participating lawyers to withdraw from representing any client who does not opt in to the settlement.

Lawyer-withdrawal provisions reduce the temptation for lawyers to cherry-pick by half-heartedly recommending the settlement to clients with strong claims because the lawyer cannot continue to represent those clients in litigation. These provisions are lower stakes than inventory-expulsion provisions for participating lawyers because the lawyer can still participate in the deal even if some clients do not want to. Therefore, the pressure on the lawyer to sign up every client is correspondingly lessened. But lawyer-withdrawal provisions decouple the lawyer's financial interests from client choice. The only way the lawyer can collect a full contingency fee is for the client to opt in to the settlement. The lawyer's advice may thus be skewed toward participation.

Like lawyer-recommendation provisions, the details of lawyer-withdrawal provisions matter. Some settlements include strong and sophisticated lawyer-withdrawal provisions. The Vioxx settlement, for example, required participating lawyers to not only withdraw from representing nonsettling clients but also to forgo any financial interest in any Vioxx-related claim, filed or unfiled.⁹⁶ This meant that lawyers could not get paid for work already done for nonsettling clients, and they could not take a referral fee for sending those clients to other lawyers. In other words, the only way the lawyers could be paid anything for their clients' claims is if they participated in the settlement.

Other settlements include less sophisticated, weaker lawyer-withdrawal provisions. The AMS mesh products settlement, for example, required participating lawyers to withdraw from representing nonsettling clients but did not require them to forgo any financial interest in those clients' claims.⁹⁷ Presumably, the lawyers could take a referral fee for sending nonsettling clients to other lawyers or seek payment for work already done on their cases. And the settlement included an ethical out: the lawyers were only required to withdraw "[t]o the extent permitted by the rules of professional conduct in any jurisdiction in which the firm may practice."⁹⁸

96. Vioxx Settlement, *supra* note 16, § 1.2.8.2.

97. AMS Settlement, *supra* note 20, § IV.I.

98. *Id.* Professor Baker has argued that the Vioxx settlement included a similar ethical out. Baker, *supra* note 83, at 1962–65.

Finally, the lawyer-withdrawal provision may sometimes be implicit. The Propusid settlement contained no express lawyer-withdrawal provision, but participating lawyers interpreted the settlement to allow them to withdraw from representing nonsettling claimants in order to prevent the defendant from excluding them under the inventory-expulsion provision.⁹⁹ Similarly, the Fosamax settlement had no explicit lawyer-withdrawal provision, but its walk-away provision gave the defendant the option to terminate the entire deal or proportionally reduce the settlement amount if less than 100 percent of claimants opted in.¹⁰⁰ Several participating lawyers who could not persuade their entire inventories to sign on withdrew from representing the nonsettling clients, and the defendant reduced the settlement amount accordingly.¹⁰¹

While lawyer-withdrawal provisions put less pressure on lawyers to sign up every client than inventory-expulsion provisions, they put far more pressure on the individual claimants. In order to reject the global settlement, a claimant needs to find a new lawyer. I leave for others the question of whether lawyer-withdrawal provisions are consistent with the legal ethics rules.¹⁰² But permitted or not, having to find a new lawyer is a big imposition on claimants and—like terms that impair the litigation value of claims outside the global settlement—raises the cost of not participating in the deal.¹⁰³

Exactly how much a lawyer-withdrawal provision raises the cost of not settling depends on the availability of new counsel willing to represent nonsettling claimants. In a competitive legal market where new lawyers are readily available and withdrawing counsel can refer nonsettling clients to other competent lawyers, the impact on claimant choice is limited. Claimants might lose their first-choice lawyers, but they retain a realistic choice between opting into the settlement or continuing to litigate with another lawyer. If, however, the settlement disrupts the referral market for existing lawyers familiar with this type of litigation and barriers to entry for new lawyers are high, then lawyer-withdrawal provisions can make it difficult for dissatisfied claimants to reject the settlement. This may allow the defendant and PSC to foist a less attractive deal on claimants.

VI. TERMS THAT ALTER THE MARKET FOR LEGAL SERVICES

In MDLs, and mass litigation more generally, lawyers—not individual claimants—are the important players. Indeed, this is the premise of structuring settlements as deals between the defendant and the claimants’

99. Propusid Form Letter, *supra* note 64, at 2.

100. *See supra* note 15.

101. Burch, *supra* note 7, at 99.

102. Professors Erichson and Zipursky have argued that the lawyer-withdrawal provisions of the Vioxx settlement violated Model Rules of Professional Conduct 1.2(a) (on client control over settlement), 5.6(b) (on restrictions on the practice of law), and 1.16 (on termination of the lawyer-client relationship). Erichson & Zipursky, *supra* note 7, at 284–90. Professor Baker offers a contrary interpretation. Baker, *supra* note 83, at 1962–65.

103. *See Rave, supra* note 1, at 1210.

lawyers, not the claimants themselves.¹⁰⁴ Without lawyers willing and able to press (and finance) their claims outside of the settlement, claimants have little ability to threaten the defendant enough to achieve a superior result. Thus, as Professor Richard Nagareda explains, claimants' ability to exit an undesirable settlement depends on alternative lawyers' ability to enter the market and seek such claimants as clients.¹⁰⁵ MDL settlement designers seeking closure may therefore include settlement terms designed to disrupt the market for legal services for claimants who wish to sue outside the settlement.

A. Lawyer Agreements Not to Sue

Agreements that participating lawyers will not bring similar claims against the defendant in the future are an effective way to get the major players out of the business. They make it harder for new claimants (or nonsettling claimants in search of new representation) to find a competent lawyer, and thus they promise the defendant some degree of closure. But express agreements by lawyers not to bring future claims violate the ethical rules in most states as impermissible restrictions on the practice of law.¹⁰⁶ Therefore, MDL settlement designers have taken other approaches.

Some MDL settlements require participating lawyers to affirm that they have "no present intention" of soliciting new clients with similar claims.¹⁰⁷ Because such provisions say nothing about what the lawyers' intentions may become in the future and do not stop lawyers from taking clients who approach them, they do not appear to have any teeth. But "no present intention" provisions may be a way for plaintiffs' lawyers to signal to defendants that they are effectively out of the business. Repeat-player lawyers may not want to develop a reputation for breaching such tacit understandings if they hope to be dealmakers in future MDLs.¹⁰⁸

Another alternative is for the defendant to retain major plaintiffs' lawyers as consultants on the settlement's implementation in an attempt to use the ethics rules to conflict them out of future representations.¹⁰⁹ But several courts and bar associations have frowned on this approach,¹¹⁰ and, in any event, there may be too many plaintiffs' lawyers who present credible threats to make such a strategy effective in an MDL.

104. See *supra* notes 69–70 and accompanying text.

105. Nagareda, *supra* note 44, at 169.

106. MODEL RULES OF PROF'L CONDUCT r. 5.6(b) (AM. BAR ASS'N 2016); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13(2) (AM. LAW INST. 2000); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 93-371 (1993); Baker, *supra* note 83, at 1958.

107. E.g., Fosamax Settlement, *supra* note 15, § 77; AMS Settlement, *supra* note 20, § IV.S.

108. See Baker, *supra* note 83, at 1960; Burch, *supra* note 7; Burch & Williams, *supra* note 7.

109. See, e.g., Erichson, *supra* note 7, at 998–99; William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1580–81, app. II (2008).

110. See Baker, *supra* note 83, at 1959.

B. Restrictions on Lawyer Advertising

Although legal ethics rules bar lawyers from expressly agreeing not to bring future claims, some settlements, like the AMS mesh products settlement, have required participating lawyers to agree not to advertise for new clients with similar claims against the defendant.¹¹¹ Restrictions on lawyer advertising add some teeth to “no present intention” provisions, and they hinder competition in the market for legal representation, making it harder for claimants dissatisfied with the settlement—and their own lawyers’ endorsement of it—to find new lawyers. And advertising restrictions work in conjunction with lawyer-withdrawal provisions to encourage claimants to opt in to the global settlement. If competing lawyers cannot advertise for new clients, dissatisfied claimants may not know that they have an alternative to opting in.¹¹²

Of course, if barriers to entry are low, new lawyers not bound by the settlement agreement may enter the market and advertise aggressively for dissatisfied claimants. But if barriers to entry are high, then restrictions on lawyer advertising can make lawyer-withdrawal provisions more coercive for clients.

C. Restrictions on Referral Fees

Targeting the referral market is another way make it harder for dissatisfied claimants to find representation outside of the settlement. The Vioxx settlement, for example, required participating lawyers to agree to forgo any financial interest in any eligible claim that did not opt in to the settlement.¹¹³ This meant that not only were lawyers prevented from representing nonsettling clients, but they also could not take referral fees for sending those clients to another lawyer.

Requiring lawyers to forgo their financial interests in nonsettling claims does not directly affect the client’s decision calculus. Indeed, it might even make it cheaper for the client to reject the settlement and sign on with a new lawyer because the previous lawyer would not be entitled to any share of the fees. But it does create an incentive for the original lawyer to pressure the client to opt in to the settlement because that is the only way the lawyer can get paid for any work on behalf of that client.

More importantly, the requirement that lawyers forgo any financial interest in nonsettling claims disrupts the referral market because the original lawyer has no financial incentive to help dissatisfied clients find new lawyers. And, without referrals, dissatisfied claimants may have difficulty finding competent new lawyers to represent them outside of the settlement. Therefore, settlement provisions that prevent lawyers from

111. AMS Settlement, *supra* note 20, § IV.S (“Claimants Counsel further represent that they will not actively solicit prospective Pelvic Mesh clients via television, radio, or website advertisement or other public or professional media outlets, either directly or indirectly through affiliates.”).

112. *See* Burch, *supra* note 7, at 93.

113. Vioxx Settlement, *supra* note 16, § 1.2.8.2.

taking referral fees for nonsettling clients reinforce lawyer-withdrawal provisions, making them more effective at achieving closure and more coercive from the clients' point of view.

CONCLUSION

MDL dealmakers gravitate toward closure provisions because peace has value for defendants in mass litigation. Lawyers who can deliver peace through a global settlement can demand a premium for their clients. But the defendant's willingness to pay for peace also creates a strategic dynamic where—unless there is some cramdown mechanism—holdouts can threaten to wreck the deal in an attempt to capture a premium for themselves.

Closure provisions that prevent strategic holdouts benefit everyone—claimants and defendants alike—as the defendant can put more money on the table, and the surplus can be allocated among the parties instead of siphoned off by strategic players. But closure provisions that make it difficult for claimants with strong claims to protect themselves by refusing to participate in a global settlement create risks that the dealmakers—the defendant and the PSC—will exploit those claimants and appropriate the peace premium for themselves. Ideal closure provisions would stop strategic players while protecting the ability of claimants who genuinely have strong claims to bargain for adequate compensation. In other words, they would disfavor holdouts but protect “hold-ins.”¹¹⁴ The trick is trying to distinguish between the two, and that is not easy to do.

Some closure provisions in MDL settlements have tried to target strategic behavior. The DePuy good faith lawyer-expulsion provision and the BP sealed walk-away threshold, for example, appear to target strategic holdouts, while allowing claimants who have genuine problems with the settlement to refuse to participate. To get those claimants to participate, the defendant will have to sweeten the deal and share a little bit more of the peace premium with claimants.

The more troubling closure provisions impair the value of litigating claims outside of the settlement and alter the market for legal services so that no competing lawyer has sufficient incentives to challenge the deal. A strong lawyer-recommendation provision reinforced by an inventory-expulsion provision and a sophisticated lawyer-withdrawal provision coupled with barriers to competition or restrictions on referral fees, like those in the Vioxx settlement, present a significant risk that even claimants who are significantly undercompensated in the global settlement will have little choice but to go along with it.

No publicly available MDL settlement since Vioxx has contained as sophisticated or as powerful a combination of closure provisions. The closest imitator, the AMS mesh products settlement, had an ethical out in its

114. Some scholars refer to individuals who refuse to participate for genuine reasons as “hold-ins.” See, e.g., Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 128–29 (2004).

attorney-withdrawal provision and targeted only attorney advertising, not the referral market.¹¹⁵

So did closure provisions make the Vioxx settlement a bad deal? It is difficult to tell, as an outsider, how big the peace premium in any given case is and how much of it goes to claimants instead of being divided among the defendants and lawyers. And there is no a priori reason to deny the defendant and negotiating lawyers a share of the peace premium.¹¹⁶ After all, the bundlers who make peace possible need to share in the gains in order to incur the transaction costs of bundling.¹¹⁷ The \$4.85 billion that Merck paid to settle the Vioxx claims is a lot of money. But when not participating in the settlement is effectively no choice at all—and there is no other mechanism for claimants to voice their disapproval of the settlement (such as the ALI’s voting model)—we need to worry that the dealmakers may be doing more than simply pocketing the peace premium. They may be exploiting claimants.

The risk that MDL dealmakers may use closure provisions to foist an unattractive deal on claimants is not an argument against global settlements in MDLs. It is not even an argument against the use of closure provisions in MDL settlements. Closure may be a precondition to settlement, and closure provisions can be critical to disabling strategic holdouts. But the potential for misuse of closure provisions may support MDL judges taking a more active role in supervising and evaluating the fairness of global settlements in even nonclass MDLs. Given how hard it can be for claimants to tell a good deal from a bad one and the risks of lawyer disloyalty, the MDL judge—who, by the settlement phase, will often be intimately familiar with the details of the litigation—may be in the best position to tell whether the peace the settlement provides is worth the price.¹¹⁸

As I have argued elsewhere, MDL judges do not need the formal power to reject a settlement (like a class action judge acting under Rule 23(e)) in order to weigh in publicly on the settlement’s fairness.¹¹⁹ The signal that the judge sends by expressing an opinion on the deal’s fairness is a powerful tool for getting information into the hands of claimants—information that they need to evaluate their lawyers’ performance and loyalty.¹²⁰ Because the success of an MDL settlement ultimately depends on obtaining buy-in from claimants, the MDL judge’s expressed skepticism toward the dealmakers’ choice of potent closure provisions without obtaining a sufficient premium for claimants in return may be enough to derail the settlement. An MDL settlement—even one with closure

115. AMS Settlement, *supra* note 20, §§ IV.B, IV.I, IV.S.

116. See Robert G. Bone, *Replacing Class Actions with Private ADR: A Comment on “Settlement, ADR, and Class Action Superiority,”* 5 J. TORT L. 127, 134 (2014) (“[T]he substantive law does not give plaintiffs any right to benefit from a peace premium or impose any obligation on the defendant to pay it.”).

117. Rave, *supra* note 1, at 1216 n.122.

118. Bradt & Rave, *supra* note 12, at 7.

119. *Id.* at 7, 21, 32–35.

120. *Id.* at 28–32.

provisions—becomes a tough sell once the judge has publicly declared it unfair. But for judges to play this role effectively, they need to understand how closure provisions work. I hope this taxonomy helps them do that.